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Supreme Court, U.S.
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Supreme Court of the United States

BERNARD MACKAY,
Petitioner,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION and AIRCRAFT MECHANICS FRATERNAL ASSOCIATION LOCAL 14,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal labor law allows each employee freely to choose or reject union membership. *Pattern Makers v. NLRB*, 473 U.S. 95, 103-05 (1985) (policy of the labor law is "voluntary unionism"); *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) ("'membership' as a condition of employment is whittled down to its financial core"); *Scofield v. NLRB*, 394 U.S. 423, 428 (1969) (the relationship between a union and its members is a mutual and voluntary contractual arrangement).

Here, the Petitioner did not sign a union membership card, take the union's membership oath, attend a union meeting, or otherwise give affirmative consent to joining. Nevertheless, the Ninth Circuit held that he became a union member by silence and acquiescence, and thereby waived his rights under *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986).

The questions presented are:

> Consistent with the federal labor policy of "voluntary unionism" and the First Amendment right of non-association, may a labor union conscript employees into union membership based solely on their silence or acquiescence?
>
> Does an employee's payment of compulsory union dues, after being warned that nonpayment will result in termination from employment, constitute "acceptance" of a union's "offer of membership"?
>
> If an employee becomes a union "member" by the simple act of paying compulsory union dues, does that employee also waive his rights under *Teachers Local 1 v. Hudson*?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the Ninth Circuit in the opinion sought to be reviewed. Alaska Airlines, Inc. was a party to the case at an earlier stage, but was dismissed from the case in a previous ruling by the lower courts, and it is no longer a party. Pursuant to Rule 29.6, the undersigned counsel states that there are no publicly held corporations or parent corporations involved in this case.

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Petitioner Bernard Mackay respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The October 30, 2008 opinion of the court of appeals (App. 1a-3a) is neither officially reported nor electronically reported. Two prior opinions of the court of appeals, dated December 21, 2006 (App. 4a-6a) and January 13, 2004 (App. 7a-10a), are not officially reported but are electronically reported at 2006 WL 3693369 and 2004 WL 61237, respectively.

The original opinions of the district court granting and denying summary judgment, dated May 3, 2002 (App. 33a-43a & 31a-32a), are neither officially reported nor electronically reported. The district

court's Memorandum and Decision dated March 22, 2005 (App. 17a-27a), issued after the first remand, likewise is not officially or electronically reported. The district court's Supplemental and Amended Findings of Fact and Conclusions of Law, dated June 4, 2007 (App. 11a-16a), issued after the second remand, is not officially reported but is electronically reported at 2007 WL 1655114.

JURISDICTION

The opinion of the court of appeals was entered on October 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides, in relevant part:

> **Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), provides in relevant part:

> **§ 152. General duties**
>
> **Eleventh. Union security agreements; check-off**
>
> Notwithstanding any other provisions of this chapter, or of any other statute or law of the

United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

A. Introduction

Petitioner Bernard Mackay brought this case under the RLA and the United States Constitution to challenge his discharge from employment with Alaska Airlines ("Alaska") for nonpayment of union dues. For over fifteen (15) years, Mackay was successfully employed by Alaska as a skilled airframe and powerplant mechanic. He had an unblemished work record. But on July 11, 2000, Alaska terminated his

employment. This act of "industrial capital punishment" was sought by the two related labor unions that purported to represent Mackay's interests, the Aircraft Mechanics Fraternal Association and its Local 14 (collectively, "AMFA" or "union"). The ostensible reason that the union demanded Mackay's discharge, which Alaska willingly carried out, was his failure to make a timely payment of union dues.

In his lawsuit, Mackay asserted that he was not a voluntary and consenting member of AMFA, having never taken a single affirmative step to join the union. Mackay's lawsuit further asserted that his discharge was unlawful because AMFA had failed to provide him, a nonmember, with the constitutionally valid notice and procedures required by *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986).

In defense, AMFA claimed that Mackay's prior payment of the compulsory union dues, demanded from him under threat of termination (App. 44a-45a), made him a "voluntary and consenting" union member who was not entitled to any of *Hudson's* procedural protections.

B. Course of Proceedings and Disposition

Mackay filed his lawsuit, which challenged his discharge from employment and AMFA's lack of valid *Hudson* procedures, in the United States District Court for the Western District of Washington, on January 2, 2001. Significant discovery ensued and all parties filed cross-motions for summary judgment.

The major contested issue on the summary judgment motions was whether or not Mackay was a voluntary and consenting member of AMFA. On May 3, 2002, the district court granted AMFA's motion for summary judgment, and denied Mackay's cross-

motion. (App. 31a & 33a). The district court ruled that Mackay was a union member because AMFA had issued a unilateral decree making all Alaska mechanics union "members," which Mackay never affirmatively protested, thus rendering him ineligible for the constitutional procedures and financial disclosures due to nonmembers under *Hudson*. (App. 33a-43a). After the district court ruled in AMFA's favor, Alaska filed a motion for summary judgment adopting AMFA's position, which also was granted. (App. 29a-30a).

Mackay appealed, challenging the finding that he was a voluntary and consenting union member based upon AMFA's unilateral decree and his alleged "silence" in the face of that decree. The Ninth Circuit reversed the granting of AMFA's motion for summary judgment and remanded for a trial, holding that there existed "genuine issues of material fact, *and of law*, in dispute as to whether Mackay was a member of the union." (App. 7a-10a, emphasis added). However, the Ninth Circuit affirmed the summary judgment in Alaska's favor, holding that Mackay could not sue Alaska because he had failed to exhaust a contractual grievance process that he had invoked against his emp' ;er. (*Id.*).

The case was returned to the district court, which held a bench trial on January 24-27, 2005. On March 22, 2005, the district court again issued a Memorandum and Decision holding that Mackay's discharge was lawful. (App. 17a-27a). However, the court did not explicitly rule on the critical question that had been remanded: was Mackay a voluntary and consenting member of AMFA as a matter of fact and law? Mackay appealed a second time, and the Ninth Circuit again vacated the judgment and ordered the

district court to explicitly determine whether or not Mackay was a voluntary member of the union as a matter of fact and law. (App. 4a-6a).

On June 4, 2007, the district court issued Supplemental and Amended Findings of Fact and Conclusions of Law (App. 11a-16a), holding that Mackay became a knowing, voluntary and consenting member of AMFA on January 6, 2000, but not because he signed a union membership application, attended union meetings, or otherwise took affirmative actions to join. Rather, the district court held that Mackay became a union member because: a) he once paid AMFA the compulsory union dues it had demanded under pain of discharge (App. 44a-45a); and b) he "ratified" his "knowing and voluntary" membership choice when he failed to file an objection under an AMFA *Hudson* policy that Mackay contends is deficient and unconstitutional. (App. 11a-16a). Mackay appealed for a third time to the Ninth Circuit.

On October 30, 2008, the Ninth Circuit affirmed the district court, holding that Mackay "accepted the union's offer of membership" when he paid the dues that AMFA had demanded under an explicit threat of discharge. (App. 3a & 44a). Thus, the Ninth Circuit ruled that Mackay became a "voluntary union member" notwithstanding the fact that he never signed a union membership card, never took the union's membership oath, never attended a union meeting, and never gave affirmative consent to joining. (App. 1a-3a).

C. Statement of Facts

Bernard Mackay was hired by Alaska Airlines as an aircraft mechanic in 1985. From that time until April 1, 1998, his bargaining unit of mechanics was

represented by the International Association of Machinists ("IAM"). For all of those thirteen (13) years, the IAM had an "open shop" contract with Alaska, meaning that employees could choose for themselves whether to join the union or pay it any dues. Given this freedom to choose, Mackay did not join the IAM, pay that union a cent in dues, or participate in any of its meetings or activities.

In 1997, AMFA began organizing Alaska mechanics in order to decertify the IAM. Mackay took no part in these activities, as he had no interest in either union. On April 1, 1998, AMFA ousted the IAM in a decertification election conducted by the National Mediation Board. Mackay did not vote in that election because he felt no affinity for either union.

Once AMFA gained representation rights at Alaska, it was anxious to collect dues as quickly as possible. To this end, AMFA issued an internal and unilateral "decree" in early April 1998 that all 900 Alaska mechanics automatically were union "members." AMFA issued this decree without individually informing the affected employees of their new status, and without regard to whether or not each employee consented to (or even knew about) his or her new status. AMFA took a database of all employees in the Alaska bargaining unit and simply called that its "membership list."

AMFA officials knew that Mackay had not been a member of the IAM union, and might not want to join AMFA either. Nevertheless, AMFA "enrolled" Mackay (and every other Alaska employee) as a "member," even though Mackay took no affirmative action to accept this decreed "membership." Indeed, AMFA required no affirmative action of any employee to

accept this ersatz "membership." AMFA asked no Alaska mechanic if he consented to this "membership," and it required no employee action to accept this "membership."

In contrast to AMFA's haphazard method of mass-inducting new union "members" by unilateral fiat, the union's constitution contains explicit requirements governing how an individual is admitted into membership. AMFA's constitution requires, *inter alia*, that applicants and prospective members: execute a standard AMFA application form; receive an AMFA membership card; take the AMFA membership oath; receive an AMFA constitution; undergo a thorough investigation by the local union's secretary-treasurer; and be accepted by an affirmative vote of the membership. Not one of these things happened with regard to Mackay's ersatz "membership." In their haste to begin dues collections, AMFA officials unilaterally decided that these constitutional requirements were too "cumbersome." In short, AMFA simply ignored its own constitutional rules.

Mackay never told a soul that he desired AMFA membership; he never signed a membership card; and he never attended a union meeting. The district court found that Mackay told AMFA's local president that he "had 'no problem' paying dues but he did not want to be involved with union activities or receive mail from the union." (App. 12a). Mackay testified that he had never joined any union in his thirty (30) plus years of employment, because he found unions to be an unwarranted buffer between him and his employer and a source of friction in the workplace. Mackay further testified that he never knowingly took any affirmative action to join AMFA, and the district court essentially recognized this. "Despite

membership requirements in both the AMFA-National Constitution and the AMFA Local 14 Bylaws, no employee in the bargaining unit [including Mackay] filled out a membership application, was investigated, or was voted in." (App. 19a). Moreover, when the union shop clause became effective in June 1999, Mackay told the local AMFA president that he would not join. The courts below ignored this testimony.[1]

On December 2, 1999, AMFA sent Mackay a letter demanding that he pay union dues or face termination under the compulsory unionism provisions of the Alaska-AMFA contract. (App. 44a-45a). In response to this discharge threat, Mackay made one payment of $90 on January 6, 2000, to avoid termination.[2] Mackay later fell into arrears,

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[1] The trial testimony is clear on this point:

> Q. And what did [AMFA President] Jurasinski say to you at that time?
>
> A. Now that AMFA is in, you're going to have to join, something like that.
>
> Q. And what did you say to him in response, if anything?
>
> A. Well, immediately I told him that I wasn't going to join and had no intention of joining. That is almost verbatim.

(Trial Transcript, District Court Docket No. 151, pp. 61-62).

[2] Mackay paid AMFA the money it demanded solely to keep his job in the face of a threat to terminate his employment (App. 44a-45a), not as a sign that he voluntarily sought union membership.

> Q. Did you think that you were joining AMFA by paying the money that was demanded in the December 2nd, 1999 letter [App. 44a-45a]?
>
> A. Definitely not.
>
> Q. When you gave [AMFA President] Jurasinski the check on January 6th, 2000, did you tell him that you wanted to be a member?

and, at the demand of AMFA, Alaska terminated his employment on July 11, 2000.

Despite the fact that Mackay never took a single affirmative action that objectively resembled a knowing and voluntary desire to join the union, the district court found that Mackay became a voluntary and consenting member of AMFA on January 6, 2000, when he paid the dues that AMFA demanded from him under pain of discharge (App.11a-16a & 44a-45a), and that he "ratified" his "choice" by failing to file an objection under AMFA's *Hudson* policy, a policy that Mackay contends is grossly defective and unconstitutional. (App. 11a-16a). The Ninth Circuit affirmed, holding that Mackay "accepted the union's offer of membership" on January 6, 2000, based upon the single payment of union dues he made to AMFA under threat of discharge. (App. 1a-3a & 44a-45a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit Failed to Follow the Precedents of This Court and Other Circuits Protecting the Right of Employees Voluntarily to Choose or Reject Union Membership.

1. Supreme Court Precedent: The Ninth Circuit departed from this Court's precedents protecting employees' right freely to choose or reject union membership, most recently reiterated in *Chamber of Commerce v. Brown*, ___ U.S. ___, ___, 128 S. Ct. 2408, 2414 (2008) (recognizing the "right of employ-

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A. No.

Q. Did you tell him that the payment of this money should signify your membership in the union?

A. No.

(Trial Transcript, District Court Docket No. 152, p. 56).

ees to refuse to join unions"). This Court has long upheld "voluntary unionism" as the core principle of federal labor law—the right of each employee to choose for himself whether to join a labor union. *Pattern Makers v. NLRB*, 473 U.S. 95, 104-05 (1985) (policy of federal labor law is "voluntary unionism"); *see NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) (membership as a condition of employment is "whittled down to its financial core"); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954) (discrimination against nonmembers unlawful); *Scofield v. NLRB*, 394 U.S. 423 (1969) (union membership is a mutual and voluntary contractual arrangement between a union and its members); *cf. NLRB v. Boeing Co.*, 412 U.S. 67 (1973) (aspects of the union-member relationship are subject to the state law of voluntary associations).

In contrast to these precedents, the Ninth Circuit sanctioned a regime of "membership by osmosis," in which a union can conscript silent nonmembers into "union membership" without their knowledge or consent, and no affirmative action is required for the workers to accept this ersatz membership. Here, the Ninth Circuit found that Mackay was a union member based on estoppel and acquiescence, rather than a knowing, explicit or affirmative act to join. The Ninth Circuit did so by holding that Mackay's mere act of paying union dues under the compulsion of an agreement requiring payment as a condition of employment, with no objective indicia of voluntary consent, made him a formal union member who consequently waived his *Hudson* rights. (App. 3a & 44a). This ruling flies in the face of the principle that union membership must be voluntary and consensual. *Pattern Makers*, 473 U.S. at 104-05; *Scofield*, 394 U.S. at 428 (internal union discipline is

only "enforceable against voluntary union members"); *see also Marquez v. Screen Actors Guild*, 525 U.S. 33, 52-53 (1998) (Kennedy, J., concurring) (recognizing that compulsory unionism clauses are sometimes used to "deceive or injure employees" and "facilitate deception").

Indeed, this Court's labor law jurisprudence is based on the principle that union membership is a voluntary contractual arrangement requiring an agreement to be bound and mutuality of promises. *Boeing Co.*, 412 U.S. at 76 ("local law of contracts or voluntary associations usually governs the enforcement of [the union - member] relationship"); *Scofield*, 394 U.S. at 430 (union discipline can only be "enforced against union members who are free to leave the union and escape the rule").[3] The Ninth Circuit disregarded these principles. According to the Ninth Circuit, AMFA's demand for compulsory dues under the forced unionism clause (App. 44a) was an "offer of membership" that Mackay "accepted" by making the compelled payment. (App. 3a). However, this Court's long line of cases mandating voluntary unionism cannot be stretched to allow such "membership by compulsion." Mackay's payment of compelled dues cannot possibly meet *Pattern Makers'* legal standard

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[3] Since *NLRB v. Boeing Co.*, state courts have refused to enforce union discipline when an employee's "membership" is not voluntary and consensual. *Communications Workers of America, Local 5900 v. Bridgett*, 512 N.E.2d 195 (Ind. Ct. App. 1987) (in a union's lawsuit to enforce its constitution and by-laws against an employee, courts must determine whether the employee voluntarily agreed to be bound by the union's internal rules before he can be considered a member subject to internal union discipline); *International Bhd. of Elec. Workers v. Trad*, 539 A.2d 316, *further proceedings*, 133 L.R.R.M. 3025 (BNA) (N.J. App. Div. 1988) (same).

allowing only voluntary union membership, but the Ninth Circuit ignored that legal standard and instead applied Washington State commercial contract cases like *Plumbing Shop, Inc. v. Pitts*, 408 P.2d 382, 384 (Wash. 1965), to find an "implied" contract of membership between Mackay and AMFA that was based on silence. (App. 3a).

Thus, the Ninth Circuit's erroneous decision squarely presents this Court with an important question of law: how does an employee become a knowing and voluntary member of a labor union (or, indeed, any private membership organization), and what must the employee do to manifest such knowing and voluntary consent to join? Cases such as *Pattern Makers* and *General Motors* confirm that voluntary consent is required under the federal labor laws, so that, in effect, an employee's "default position" is nonmembership in the union unless and until he affirmatively chooses to change that status. *See also Davenport v. Wash. Educ. Ass'n*, ___ U.S. ___, 127 S. Ct. 2372 (2007) (state can constitutionally set an employee's "default" position to be opposition to union political and ideological activities).

In fact, a hallmark of our free society is the concept that every individual's "default position" is nonmembership in a particular church, political party or labor union, unless and until that person takes some affirmative action to join. *Carroll v. Blinken*, 957 F.2d 991, 995, 1003 (2d Cir. 1992) (policy of compelled membership in an ideological group unconstitutional). A contrary result would leave every church, club, union or political party free to conscript anyone it chooses into membership, an action that is antithetical to the freedom of association under the First Amendment. The Ninth Circuit has sanctioned

just such a result by holding that the mere act of paying compelled union dues is sufficient to change an employee's status from nonmember to member, even when the union changes the status without the employee's knowledge or consent, as was done here.

In our free society, no political party, association or religious group is granted the power to force its message onto others. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (homosexual groups have no First Amendment right to participate in another group's festival). Labor unions are entitled to no exception from this rule, and they should not be allowed to force membership on employees via stealth or compulsion. This Court must correct the Ninth Circuit's grievous ruling allowing unions to conscript untold thousands of employees into ersatz "membership" arrangements simply because they pay compulsory union dues under threat of termination. (App. 44a-45a).

2. Circuit Court Precedent: The Ninth Circuit and the district court also departed from the decisions of other circuits, which recognize that "enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected." *Bloom v. NLRB*, 153 F.3d 844, 849-50 (8th Cir. 1998), *vacated on other grounds sub nom. OPEIU Local 12 v. Bloom*, 525 U.S. 1133 (1999); *United Nuclear Corp. v. NLRB*, 340 F.2d 133, 136-37 (1st Cir. 1965) (employees cannot be made union "members" against their will, in an *ultra vires* manner; concept of "membership by estoppel" rejected); *see also Carroll*, 957 F.2d at 995, 1003 (students paying a compulsory "student activity fee" cannot be considered automatic members of the entity demanding the fee). Indeed, the decisions below are contrary to earlier decisions

of the Ninth Circuit itself. *See United Stanford Employees, Local 680 v. NLRB*, 601 F.2d 980 (9th Cir. 1979) (employees have the right voluntarily to assume or reject union membership); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975) (employees cannot be forced to enter into a contract of formal union membership but can do so voluntarily if they choose).

The ruling below stands in stark conflict with the Second Circuit's decision in *Carroll*. *Carroll* was a constitutional challenge to a mandatory "student activity fee" that all university students were required to pay as a condition of enrolling. The students objected to compelled association with an organization called NYPIRG, which maintained a rule that every student who paid the mandatory activity fee was automatically a member of NYPIRG. The Second Circuit struck down NYPIRG's "automatic membership" policy as a violation of the students' rights of free association, and ordered NYPIRG to "redefine its membership to include only those students who consent to becoming members, and not simply every student *who pays an activity fee*." 957 F.2d at 1003 (emphasis added).

In direct conflict with *Carroll*, the Ninth Circuit characterized AMFA's December 2, 1999 demand for compulsory dues under the "union security" clause (App. 44a) as an "offer of membership" that Mackay "accepted" by making the compelled dues payment. (App. 3a). The Ninth Circuit ignored the fact that Mackay was threatened with discharge if he did not pay the fee demanded under compulsion of the union's contract with his employer. (App. 44a). As the Second Circuit properly recognized in *Carroll*, such coercion cannot be squared with the non-

association principles of the First Amendment. They also cannot be squared with the provisions of federal labor law, which mandates "voluntary unionism." *Pattern Makers*, 473 U.S. at 104-05.[4]

The Ninth Circuit panel also failed to follow the contrary decision of the First Circuit in *United Nuclear Corp.*, although an earlier Ninth Circuit panel in this case explicitly cited and relied upon *United Nuclear*. (*Compare* App. 1a-3a *with* 7a-10a). In *United Nuclear*, a union claimed that employees automatically became union members when they paid initiation fees and voted in an internal election. But the First Circuit held that even these affirmative acts did not equate to voluntary union membership, where the union's constitution required more, *e.g.*, the signing of a membership application:

> [E]ven if it be true that some Union officers did treat some or all of the 50 [employees] as members, they could not become members by estoppel. . . . The officers acted ultra vires and could not by their own action create members in ways not authorized by the body of the membership or by the constitution it had adopted.

340 F.2d at 137.

Here, like the union in *United Nuclear*, AMFA ignored its own constitution when it decreed that all Alaska mechanics were automatically union members. That constitution explicitly requires, *inter alia*, a written membership application and formal mem-

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[4] Although this case arises under the Railway Labor Act, the constitutional principles of free association under the First Amendment apply with full force. *Ellis v. Railway Clerks*, 466 U.S. 435, 45 (1984); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 231-32, 236-38 (1956).

bership oath, neither of which occurred here. AMFA thus violated not only the principles of "voluntary unionism" by equating Mackay's mere payment of compulsory dues under threat of discharge with his voluntary and consenting union membership, but its own constitution.

The Ninth Circuit ignored the contrary decisions of other circuit courts, all of which decry the notion that union membership can be manufactured automatically or compelled via estoppel or acquiescence. *Carroll*, 957 F.2d at 995, 1003; *United Nuclear Corp.*, 340 F.2d at 136-37 ("membership by estoppel" rejected); *Bloom*, 153 F.3d at 849-50. Like the mere payment of student fees in *Carroll*, Mackay's simple act of paying dues under the compulsion of AMFA's "union security" clause cannot, as a matter of law, turn him into a voluntary and consenting AMFA member. The Ninth Circuit was wrong to hold otherwise.[5]

3. National Importance of the Issue: The issues presented in this case have important national implications. The Ninth Circuit's decision undermines the fundamental federal labor principles of "voluntary unionism," *Pattern Makers*, 473 U.S. at 104-05, by placing the onus on employees to resist ersatz union "memberships" foisted upon them

[5] An employee's payment of union dues in the absence of a compulsory "union membership" clause would present a different issue from that presented here. This case is presented against the backdrop of AMFA's compulsory dues contract with Alaska and the union's "pay union dues or be fired" demand letter. (App. 44a-45a). Significantly, Mackay did not pay AMFA dues before the compulsory unionism provision was negotiated, and when it came into effect he told the union president "I wasn't going to join and had no intention of joining." (Trial Transcript, District Court Docket No. 151, pp. 61-62).

against their will or even without their knowledge. That decision also undermines this Court's ruling in *Hudson* that prophylactic procedures are required before employees can be compelled to pay union dues against their will. *See also Communications Workers of America v. Beck*, 487 U.S. 735 (1988) (NLRA); *Ellis*, 466 U.S. at 455-57.

Here, AMFA ignored the "cumbersome" provisions of its own constitution to conscript over 900 Alaska Airlines mechanics into an ersatz "membership" status. The union then rushed to collect dues from all of its so-called "members" without providing a proper *Hudson* notice and financial disclosure. Mackay's lawsuit challenged the adequacy of AMFA's *Hudson* disclosure, but the Ninth Circuit never reached that issue. Although recognizing this as a "*Hudson* case" (App. 1a), the Ninth Circuit refused to reach the *Hudson* issue once it held that Mackay was a union member. The Ninth Circuit assumed that the protections of *Hudson* and *Ellis* apply only to nonmembers. *See, e.g., Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283 (4th Cir. 1991) (voluntary union members are not entitled to procedural protections mandated by *Hudson* and *Ellis*). However, this Court has never adopted such a narrow reading of *Hudson*, or limited *Hudson*'s protections only to nonmembers. The Court certainly has not held that those protections do not apply where, as here, the employee's alleged "membership" is involuntary, and he has not sought to join the union, unlike the plaintiff in *Kidwell*.

Therein lies the great danger of the Ninth Circuit's ruling. It allows unions to conscript employees into membership via silence and osmosis, not give them the notice and financial disclosure mandated by

Hudson precisely *because* of their alleged membership status, and then use their forced dues for political, ideological and other nonbargaining purposes they do not support. Unions around the country will surely replicate this deception unless this Court exercises its supervisory power over the Ninth Circuit. *Marquez*, 525 U.S. at 52-53 (Kennedy, J., concurring) (recognizing that the technical language of union security clauses often deceives employees about their rights to become or remain nonmembers).

CONCLUSION

This Court has repeatedly recognized that federal labor policy favors voluntary unionism—the right of each employee to choose for himself whether to join a labor union or not. Because the Ninth Circuit's ruling in this case is contrary to the decisions of this Court and other Circuits and severely undermines this important national policy, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct 30, 2008]

No. 07-35475
D.C. No. CV-01-00003-RSM

BERNARD J. MACKAY,
Plaintiff - Appellant,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION, an unincorporated association; LOCAL 14 AIRCRAFT MECHANICS FRATERNAL ASSOCIATION LOCAL 14, an unincorporated association,
Defendants - Appellees.

Appeal from the United States District Court for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted October 24, 2008
Seattle, Washington

MEMORANDUM

Before: RYMER and FISHER, Circuit Judges, and HURLEY,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Denis R. Hurley, Senior United States

This *Hudson*[1] case turns on whether Bernard J. Mackay was a member of the Union. On the first appeal, we reversed summary judgment in favor of the Aircraft Mechanics Fraternal Association and its Seattle Local 14 because there were triable issues of fact on this issue. *Mackay v. Aircraft Mechanics Fraternal Ass'n*, 85 Fed. Appx. 605, 606 (9th Cir. Jan. 13, 2004). Following a bench trial, on the second appeal, we remanded because we could not tell whether the district court found that Mackay was, or was not, a member. *Mackay v. Aircraft Mechanics Fraternal Ass'n*, 214 Fed. Appx. 677 (9th Cir. Dec. 21, 2006). On remand, the court squarely found that Mackay was a member. He appeals, and we affirm.

There is evidence from which the district court could have gone either way. We are not firmly convinced that it erred, as there is a plausible basis in the record for its finding. Mackay was twice told that he could be either a Union member who paid dues, or a nonmember who paid agency fees. He was told that under the union security clause in the collective bargaining agreement, he could lose his job if he did not pay one or the other. Mackay was also twice given the Nonmember Fee Policy, which explained, among other things, the difference between Union expenses germane to collective bargaining—which all employees cover—and non-germane expenses—which only members are obliged to cover. The Policy also indicated that employees were required to pay either dues or fees to keep their job. Mackay did not pay anything until January 2000,

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District Judge for the Eastern District of New York, sitting by designation.

[1] *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

when he wrote a check for past dues owed after being warned that his name would be submitted for termination. At no time did he tell Union officials that he did not want to pay dues or be a member. The court could conclude that Mackay thereby accepted the Union's offer of membership. *See Hoglund v. Meeks*, 170 P.3d 37, 46 (Wash. Ct. App. 2007); *see also Hearst Commc'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005); *Plumbing Shop, Inc. v. Pitts*, 408 P.2d 382, 384 (Wash. 1965).

AFFIRMED.

APPENDIX B

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Dec 21, 2006]

No. 05-35338
D.C. No. CV-01-00003-RSM

BERNARD J. MACKAY,
Plaintiff - Appellant,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION,
an unincorporated association; *et al.*,
Defendants - Appellees.

Appeal from the United States District Court for the
Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted November 14, 2006
Seattle, Washington

MEMORANDUM*

Before: RYMER, BERZON, and TALLMAN, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Bernard Mackay appeals the district court's judgment following a bench trial in favor of Aircraft Mechanics Fraternal Association and its Seattle Local 14 (collectively, "the Union"). This case is on its second trip to this court. On the last visit, we reversed the district court's summary judgment in favor of the Union "[b]ecause there [were] genuine issues of material fact, and of law, in dispute as to whether Mackay was a member of the Union." *Mackay v. Aircraft Mechanics Fraternal Ass'n*, 85 Fed. Appx. 605, 606 (9th Cir. 2004). We remanded for the district court to resolve the question of Mackay's membership in the Union and, depending on the outcome of that determination, to reach the other issues raised by the parties. *Id.* at 606-07.

The district court conducted a four-day bench trial and issued a memorandum and decision with its findings of fact and conclusions of law on March 22, 2005. Among other things, the court concluded that Mackay did not affirmatively make known to the Union his election of nonmember status or invoke his right to pay nonmember agency fees rather than dues, nor did he affirmatively make known any desire to dissent from the agency fee calculation; instead, Mackay acquiesced in the payment of delinquent dues without invoking his right to be a dissenting nonmember. The court stated, "[w]hile these facts did not, without more, make plaintiff a *de facto* member of the union, they reasonably led union officials to believe that plaintiff was a member rather than a nonmember." Conclusions of Law, ¶6.

Mackay contends on appeal that we should infer that the district court found he was *not* a member, while the Union maintains that we can infer that the court found either Mackay was a member or the

Union was justified in treating him as such. Because it is not clear whether the court found that Mackay was a member of the Union or was not a member of the Union, we cannot resolve this appeal.

Accordingly, we vacate the district court's judgment and remand for further proceedings consistent with this disposition.

VACATED AND REMANDED.

APPENDIX C

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan 13, 2004]

No. 02-35797
D.C. No. CV-01-00003-RSL

BERNARD J. MACKAY,
Plaintiff - Appellant,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION - SEATTLE LOCAL 14, an unincorporated association; ALASKA AIRLINES, INC., a Delaware corporation,
Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted September 10, 2003
Seattle, Washington

MEMORANDUM*

Before: THOMPSON, HAWKINS, and BERZON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Bernard Mackay appeals the district court's summary judgment in favor of the Aircraft Mechanics Fraternal Association and Aircraft Mechanics Fraternal Association-Seattle Local 14 (the "Union") and Alaska Airlines. The district court concluded that Mackay was a member of the Union, and as a result he was precluded from bringing this lawsuit in the district court because he had not exhausted his administrative remedies specified in the collective bargaining agreement. Shortly thereafter, the court granted summary judgment in favor of Alaska Airlines for the same reasons.

We have jurisdiction under 28 U.S.C. § 1291. We reverse the summary judgment in favor of the Union, but affirm the summary judgment in favor of Alaska Airlines.

Summary judgment in favor of the Union was granted solely upon the district court's finding that Mackay was a member of the Union. That finding, however, is a finding of fact as to which there is a genuine dispute.

Although there are a number of facts which suggest that Mackay acquired membership in the Union by conduct or acquiescence, neither Mackay nor the Union complied with any of the requirements for membership in the Union as set forth in Article XII of the Union's constitution. These requirements include (1) submission of an application form, (2) the receipt of a membership card, (3) receipt of the Union's constitution and taking of the Union loyalty oath, and (4) an investigation by the local secretary. The Union argues formal requirements for membership were waived, but Mackay disputes this and alleges that his conduct did not make him a Union member. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 279 (1973)

("[A]n employee does not become a member of the union merely by signing a [representation] card."); *United Nuclear Corp. v. N.L.R.B.*, 340 F.2d 133, 137 (1st Cir. 1965) (voting in election not "automatic proof of [union] membership"; concept of membership by estoppel rejected); *Moynahan v. Pari-Mutuel Emp. Guild of Cal., Local 280*, 317 F.2d 209, 210 (9th Cir. 1963) (employee who failed to fulfill all requirements for membership as provided in union constitution and bylaws not a union member); *Agola v. Hagner*, 678 F. Supp. 988, 992 n.4 (E.D. N.Y. 1987) (members of bargaining unit who failed to apply for membership, pay initiation fees, or abide by other membership procedures as required by union's bylaws not union members).

Because there are genuine issues of material fact, and of law, in dispute as to whether Mackay was a member of the Union, we reverse the district court's summary judgment in favor of the Union. The district court did not reach the other issues raised by the parties in Mackay's claim against the Union and neither do we. Depending upon how the disputed issue of union membership is resolved, the district court may or may not have to reach the other issues the parties raise.

We affirm, however, the district court's summary judgment in favor of Alaska Airlines. Mackay's claims against Alaska fail whether he was or was not a member of the Union. Mackay's original grievance was predicated upon his discharge for failing to pay union dues. The first time Mackay asserted non-member rights under *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066 (1986), vis-a-vis Alaska was in his notice of appeal from Alaska's denial of his grievance, and his appeal was with-

drawn. Having filed and abandoned a grievance against his employer regarding his discharge, Mackay may not seek to evade the results of the grievance process by litigating his termination in court. *See Peoples v. Southern Pac. Co.*, 232 F.2d 707, 708 (9th Cir. 1956).

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings as to Mackay's claims against Aircraft Mechanics Fraternal Association and Aircraft Mechanics Fraternal Association-Seattle Local 14.

Alaska shall recover its costs on appeal from Mackay. Mackay shall recover one-half of his costs on appeal from Aircraft Mechanics Fraternal Association and Aircraft Mechanics Fraternal Association-Seattle Local 14, in the aggregate.

BERZON, J., concurring

I write separately to note that if the determination after trial is that Mackay was a non-member of the union, the application of *Peoples v. S. Pac. Co.*, 232 F.2d 707, 708 (9th Cir. 1956), and *Stumo v. United Airlines Inc.*, 382 F.2d 780 (7th Cir. 1967), on which the defendant union relies, may depend upon whether relief is available against the union from the Board of Adjustment. *See* 45 U.S.C. § 153 First(i) (1986) ("The disputes *between an employee or group of employees and a carrier or carriers* growing out of grievances . . . shall be handled in the usual manner . . . ; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . ." (emphasis added)). That issue has not heretofore been addressed by the parties or the district court.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C01-03

BERNARD MACKAY,

Plaintiff,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION, an unincorporated association, et al.,

Defendants.

SUPPLEMENTAL AND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court pursuant to the Order of Remand from the Ninth Circuit Court of Appeals, directing this Court to clarify whether plaintiff was, or was not, a member of the Aircraft Mechanics Fraternal Association ("the Union"). Dkt. # 156. The Union moved for entry of findings and conclusions, together with judgment in its favor, and plaintiff opposed this motion. Oral argument was heard on March 9, 2007. After thorough consideration of the arguments presented at the hearing, the memoranda of the parties, and the record, including the transcript of the January, 2005 trial, the Court now finds and rules as follows:

(1) Finding of Fact # 10

This Finding of Fact states as follows:

10. Kevin Jurasinski, another co-worker who had known plaintiff since 1985, was elected President

> of AMFA-Local 14 in June of 1998. In October of 1999, after plaintiff's name appeared on a list created by AMFA-National of members who were in arrears on their dues, Mr. Jurasinski spoke with plaintiff in the composite shop. He informed Mr. Mackay that his job was at risk because he was in arrears in his dues. Mr. Mackay expressed his concerns about joining a union, and Mr. Jurasinski gave him a copy of the nonmember dues objector policy and informed him that he had to either pay union dues or pay a nonmember agency fee. Mr. Mackay responded that he had "no problem" paying dues but he did not want to be a union member. The Court finds that Mr. Jurasinski was a highly credible witness.

Dkt. # 136, FF # 10. The appeals court noted that this finding is ambiguous as to what plaintiff actually said regarding being, or not being, a member.

The Court has reviewed Mr. Jurasinski's testimony to clarify this matter. On January 26, 2005, Mr. Jurasinski testified on direct examination that he approached plaintiff in October of 1999 to tell him he was being "tracked" by the union for non-payment of dues. The conversation took place in plaintiff's work area. Mr. Jurasinski told him that "he would be putting his job at risk if he didn't either pay dues or an agency fee to the union." Transcript of Proceedings, Dkt. # 153, p. 31. When asked, "What was his response, if any?", Mr. Jurasinski responded, "He didn't really have much to say except he didn't have a problem paying the dues, he **just didn't want to be involved with any union activities or get mail from the union**." *Id.* Mr. Jurasinski also testified that he gave plaintiff a copy of the then-current dues objector policy on this occasion. *Id.*, p. 33.

Plaintiff's own testimony regarding this encounter was that he did not recall any conversation when he gave Mr. Jurasinski his check for dues. Transcript of Proceedings, Dkt. # 152, p. 7. He acknowledged that there would have been some friendly conversation, but he did not recall the content. *Id.*, p. 8. He did confirm that the never said that the check was for agency fees and not for union dues. *Id.*

The finding that plaintiff stated that "he had 'no problem' paying dues but he did not want to be a union member" thus incorrectly summarizes the testimony. The Court now AMENDS Finding of Fact # 10 to state as follows:

FINDING OF FACT # 10 (Amended):

10. Kevin Jurasinski, another co-worker who had known plaintiff since 1985, was elected President of AMFA-Local 14 in June of 1998. In October of 1999, after plaintiff's name appeared on a list created by AMFA-National of members who were in arrears on their dues, Mr. Jurasinski spoke with plaintiff in the composite shop. He informed Mr. Mackay that his job was at risk because he was in arrears in his dues. Mr. Mackay responded that he had "no problem" paying dues but he did not want to be involved with union activities or receive mail from the union. He did not state that he did not want to be a union member. Mr. Jurasinski gave him a copy of the nonmember dues objector policy and informed him that he had to either pay union dues or pay a nonmember agency fee. The Court finds that Mr. Jurasinski was a highly credible witness.

(2) **Conclusion of Law # 6**

The Court previously concluded as follows:

6. Plaintiff did not at any time, by word or conduct, affirmatively make known to the union his

> election of nonmember status or invoke his right to pay nonmember agency fees rather than dues. Nor did he affirmatively make known any desire to dissent from the agency fee calculation. Instead, in January of 2000, he acquiesced in the payment of delinquent dues without in any way invoking his right to be a dissenting nonmember. While these facts did not, without more, make plaintiff a *de facto* member of the union, they reasonably led union officials to believe that plaintiff was a member rather than a nonmember.

Dkt. # 136, CL # 6. The appeals court has directed this Court to clarify whether plaintiff was, or was not, a member of the Union. In order to do so, the Court makes the following Supplemental Findings of Fact:

a. Mr. Jurasinski gave plaintiff a copy of the dues objector policy in October of 1999, several months before January 6, 2000 dues payment.

b. Steve Lovas also gave plaintiff a copy of the earlier version of the dues objector policy, in June of 1999. Mr. Lovas discussed with plaintiff the meaning of "germane" and "non-germane" expenses. Mr. Lovas also testified that he saw plaintiff read the document, and that he asked questions about it. Transcript, Dkt. # 152, p. 157.

c. On January 6, 2000, when plaintiff handed his dues check to Mr. Jurasinski, he had been twice advised of the dues objector policy. Nevertheless, he voluntarily paid the full amount of dues, without mentioning the non-member policy or in any way invoking his right to dissent from membership. Plaintiff confirmed this in his own testimony. Transcript, Dkt. # 152, p. 29.

d. On the same visit, January 6, 2000, after collecting the check, Mr. Jurasinski reminded plaintiff that January was the time to officially advise the union if he wished to invoke his right to be a dues objector. Plaintiff did not respond and never provided notice to the union.

e. Plaintiff later again fell in arrears, and was advised by a letter from the union, dated May 17, 2000, that he owed $270 in dues. Plaintiff testified that Mr. Juransinski again came to his shop to collect the dues. Plaintiff stated that he was willing to write the check, but that he didn't have his checkbook at the time. Also, they were not sure of the amount. Transcript, Dkt. # 152, p. 34-35. Plaintiff testified that it "didn't matter to me what the amount was. I was going to pay it." *Id.* When Mr. Jurasinski later came to collect the check, plaintiff was busy in a job involving chemicals, and he did not stop to write the check. *Id.* He did not say at that time that he did not wish to pay dues.

f. After his termination, plaintiff filed a grievance and attempted to pay the back dues. He stated he was willing to pay the dues. He did not at that time mention the dues objector policy or attempt to claim status as a dues objector. It was not until the appeal of the grievance denial that plaintiff first claimed dues objector status.

On these additional factual findings, the Court makes the following Supplemental Conclusion of Law:

CONCLUSION OF LAW # 7a

7a. Plaintiff became a voluntary member of the union on January 6, 2000, when he handed to Mr. Jurasinski a check for the full amount of dues owed,

without invoking his rights under the dues objector policy, despite having been twice advised of that policy. Plaintiff subsequently ratified his membership in the union throught January of 2000, when he continually failed to invoke any rights under the dues objector policy, after being advised by Mr. Jurasinski that January was the time to officially advise the union if he wished to invoke such rights for the coming year. Plaintiff further ratified his membership after receiving the May 17, 2000 notice of delinquency in his dues, when he told Mr. Jurasinski on two occasions that he would write the check. These actions were taken after plaintiff had been advised on several occasions of the dues objector policy and the procedure for invoking dues objector status. These actions constituted knowing and voluntary acceptance of membership status.

CONCLUSION

With these amended and supplemental Findings of Fact and Conclusions of Law, the Court now GRANTS defendants' motion for entry of judgment. Dkt. # 157. The Clerk shall accordingly enter judgment in favor of defendants.

DATED this 4 day of June 2007.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C01-003RSM

BERNARD MACKAY,

Plaintiff,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION, an unincorporated association, AIRCRAFT MECHANICS FRATERNAL ASSOCIATION-SEATTLE LOCAL 14, an unincorporated association, and ALASKA AIRLINES, INC., a Delaware corporation.

Defendants.

MEMORANDUM AND DECISION

This matter was heard by the Court in a four-day bench trial commencing on January 24, 2005. Plaintiff Bernard Mackay was formerly employed by Alaska Airlines as an airframe and powerplant mechanic. He was terminated in July of 2000 at the request of defendant Aircraft Mechanics Fraternal Association ("AMFA")[1] for failure to pay union dues. He filed this lawsuit alleging that defendants denied him due process and his right to dissent from union activities, in violation of the Railway Labor Act and the First, Fifth and Fourteenth Amendments. Plaintiff

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[1] The Court in this Order will refer to the defendant unions collectively, except where it is necessary to distinguish them as "AMFA-National" and "AMFA-Local 14."

also asserted a claim concerning enforcement of an indemnification clause but that has been dismissed.

The Court earlier dismissed the entire action on separate motions for summary judgment by defendants. The Ninth Circuit Court of Appeals affirmed the dismissal as to Alaska Airlines, but reversed that ruling as to the defendants AMFA-National and AMFA-Local 14, and remanded the case for trial. The appeals court found that there were issues of fact and law as to whether plaintiff was a member of the union.

The Court has fully considered the evidence presented at trial, the exhibits admitted into evidence, and the argument of counsel, and being fully advised, now makes the following Findings of Fact and Conclusions of Law, and renders a decision.

FINDINGS OF FACT

1. Plaintiff Bernard Mackay was employed as an aircraft mechanic at Alaska Airlines from April 1985 until July 2000 when he was discharged.

2. When plaintiff was hired in 1985, the bargaining unit for the mechanics at Alaska Airlines was the International Association of Machinists and Aerospace Workers ("IAM"). Under the collective bargaining agreement between Alaska and IAM, there was no union security clause requiring that employees join the union as a condition of employment. Plaintiff was not a member of IAM.

3. On or about April 1, 1998, AMFA was certified by the National Mediation Board as the new and exclusive bargaining representative for Alaska Airlines mechanics.

4. On April 8, 1998, AMFA National Director O.V. Delle-Femine sent out a memo addressed to "AMFA-

ASA members," in which he stated, "In AMFA everyone is a member in good standing and they can vote on the contract, the by-laws and local officers. So it is imperative that we obtain your address." This memo was posted on a bulletin board near plaintiff's work area, but it was not mailed to plaintiff. Plaintiff testified that he never looked at the AMFA bulletin board because he was not a member of AMFA. Plaintiff did not provide his address to AMFA.

5. An election was held on June 21, 1999 to ratify the collective bargaining agreement ("CBA") between AMFA and Alaska Airlines. Plaintiff obtained an absentee ballot and voted his ballot on June 23, 1999.

6. The CBA, effective June 25, 1999 to December 25, 2002, included a union security clause which required covered employees to become members of AMFA within sixty days as a condition of employment. Article 31 of the CBA provided a procedure for the discharge of employees who, after notice, failed to remit dues to the union. A copy of the ratified CBA was given to plaintiff, who signed a receipt for it on August 31, 1999.

7. Steve Padel, Secretary of AMFA-Local 14 from June of 1998 to December of 2001, testified that all Alaska Airline employees in the bargaining unit were carried on the union roles as members. No employee was asked to give consent, nor was any affirmative action required of anyone to become a member. Despite membership requirements in both the AMFA-National Constitution and the AMFA-Local 14 By-laws, no employee in the bargaining unit filled out a membership application, was investigated, or was voted in. Only the elected officers took an oath of membership.

8. During the relevant time period, AMFA had a "dues objector" policy, under which an employee in the collective bargaining unit could assert his right to be a nonmember of the union, and thereby pay only a "service fee" (or "agency fee") equivalent to that portion of the union dues which is "germane" to the union's collective bargaining activities. The policy, titled "Policies and Procedures Applicable to Nonmember Fee Payers," required that anyone wishing to be a nonmember dues objector must submit written notice of objection between January 1 and January 31 of each year, or within sixty days from the commencement of the objector's obligation to pay union dues. The policy also required the Treasurer to segregate AMFA's germane from non-germane expenses, so that they could be properly identified as such. Following each year's audit, the Treasurer was required to compile a "Statement of Germane and Non-Germane Expenses," which would be sent to each nonmember who was required to pay a service fee. A copy of this policy was posted on the AMFA bulletin board shortly after the June 1999 ratification election.

9. Steve Lovas, an AMFA member and shop steward, worked with plaintiff in the composite shop from 1998 until July 2000. He testified that he gave a copy of the nonmember fee payer policy to plaintiff in the summer of 1999, and discussed with him the meaning of "germane" and "non-germane" expenses. He explained to plaintiff that he must either pay membership dues or a nonmember agency fee. He stated that he did this out of concern that Mr. Mackay might want to "become" a nonmember. On cross-examination, when challenged with a statement in his earlier declaration that "I advised plaintiff that if he wanted to become a nonmember dues objector, he

must notify the Union," he admitted that he did not actually know whether plaintiff was a union member or not. Mr. Lovas also testified that he did not give a copy of the dues objector policy to any employee other than plaintiff. The Court finds that Mr. Lovas was a highly credible witness.

10. Kevin Jurasinski, another co-worker who had known plaintiff since 1985, was elected President of AMFA-Local 14 in June of 1998. In October of 1999, after plaintiff's name appeared on a list created by AMFA-National of members who were in arrears on their dues, Mr. Jurasinski spoke with plaintiff in the composite shop. He informed Mr. Mackay that his job was at risk because he was in arrears in his dues. Mr. Mackay expressed his concerns about joining a union, and Mr. Jurasinski gave him a copy of the nonmember dues objector policy and informed him that he had to either pay union dues or pay a nonmember agency fee. Mr. Mackay responded that he had "no problem" paying dues but he did not want to be a union member. The Court finds that Mr. Jurasinski was a highly credible witness.

11. The December 1999, issue of "The Grapevine," the quarterly newsletter of AMFA-National, contained a section on the union's dues objector policy. The notice stated that the allocation of germane and non-germane expenses for 1999 would be available following the conclusion of the audit for that year, in June of 2000. The statement of germane and non-germane expenses, together with the auditors' report, was duly issued June 15, 2000. The statement allocated 95.58% of the total expenses to germane expenses.

12. On December 2, 1999, AMFA-National mailed to plaintiff a registered letter informing him of his

dues delinquency in the amount of $88 for the months of September and October 1999, and advising him that pursuant to Article 31 of the Agreement (the CBA), his name would be submitted for termination if he did not make the requisite payment by December 17, 1999. The letter was sent via Alaska Airlines Labor Relations Manager Gail Neufeld, because AMFA-National did not have plaintiff's address. AMFA-Local 14 also received a copy of the letter.

13. On January 6, 2000, Kevin Jurasinski talked with plaintiff in the composite shop to inform him that he was on his way to deliver plaintiff's name as being in arrears in his dues. He also told plaintiff that January was the time to present notice to the union of dues objector status if he wished to do so. Plaintiff gave Mr. Jurasinski a check in the amount of $90.00, marked "Nov/Dec" in the memo section. He did not say anything regarding status as a dues objector.

14. On May 17, 2000, AMFA-National sent another notice of dues delinquency to plaintiff, informing him that he owed $270 for six months' dues from September 1999 through April 2000. This amount takes into account the $90 plaintiff paid for November and December. The letter again advised plaintiff that pursuant to Article 31 of the CBA he had fifteen days to either remit the amount due or provide proof that he had already done so.

15. On June 16, 2000, AMFA-National Treasurer Steve Kadziulis sent notification to Gail Neufeld, Alaska Airlines Labor Relations Manager, that plaintiff had failed to pay dues within the grace period, and was to be discharged pursuant to Article 31 of the CBA. On July 11, 2000, plaintiff was presented with a termination letter from Alaska Airlines, stat-

ing that he had been "given an opportunity to join the union and have refused to do so." The termination was effective immediately.

16. Plaintiff filed a grievance with Alaska Airlines. At a hearing on July 19, 2000, he tendered a check for the delinquent dues to Louie Key, the Alaska Airlines Representative for AMFA-Local 14. Mr. Key stated that he could not accept the check on behalf of the union but would contact the Local Executive Council ("LEC"). The LEC subsequently declined to accept the offer of payment. The grievance was denied, and plaintiff, through counsel, appealed and requested an arbitration hearing. Alaska Airlines notified counsel on August 31, 2000, that it was in the process of scheduling the arbitration. On January 6, 2001, four days after filing this lawsuit, plaintiff notified Alaska Airlines and AMFA-Local 14 that he was withdrawing his grievance and request for arbitration.

17. The Court finds that plaintiff was also a highly credible witness. To any extent that his testimony was contradicted by that of Mr. Jurasinski or Mr. Lovas, the Court has credited the latter on the basis that plaintiff's testimony was that he "did not recall" the events to which they testified. Although plaintiff's trial testimony regarding Steve Lovas handing him a copy of the dues objector policy was "That did not occur," in his deposition he agreed with counsel that he did not recall being handed the policy.

CONCLUSIONS OF LAW

1. Alaska Airlines is a "common carrier by air engaged in interstate or foreign commerce" such that the Railway Labor Act ("RLA") governs the collective bargaining relationship with AMFA. 45 U.S.C. § 181;

Airline Pilots Association v. Miller, 523 U.S. 866, 872 (1998). Section 2, Eleventh, of the RLA, 45 U.S.C. § 152, Eleventh, allows employers and unions to create agency-shop agreements. *Id.* The statutory authorization for such agreements aims to resolve the problem of "free-riders—employees in the bargaining unit on whose behalf the union [is] obliged to perform its statutory functions, but who refus[e] to contribute to the cost thereof." *Id, quoting Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984).

2. Imposition of agency fees under the RLA is "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress . . . ." *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977).

3. Under agency-shop arrangements, nonmembers of the union must pay their fair share of those union expenditures which are "necessarily or reasonably incurred" by the union for the purpose of performing its duties in labor-management relations on behalf of the employees it represents. *Airline Pilots*, 523 U.S. at 873. To avoid constitutional problems, the union may not impose costs unrelated to those duties, such as political expenditures, on objecting employees. *Id.*; *citing Ellis*, 466 U.S. at 448-455 and *Railway Clerks v. Allen*, 373 U.S. 113, 121 (1963). Nonmembers may, however, be compelled to contribute to those expenditures which are "germane to collective bargaining activity." *Id.*

4. In order to protect a nonmember's First Amendment right to avoid having any part of his required agency fees used for political activities, the Supreme Court declared that before a union may collect fees through an agency shop agreement, it must explain

the basis for the fee, and provide a reasonably prompt opportunity to challenge that calculation before an impartial decision maker. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310. (1986). Unions must keep dissenting employees' fees in an escrow account pending resolution of any challenge. *Id.* If these procedures are not in place, a union has "no right to enforce an agency shop agreement to collect fees for use in any union activity beyond collective bargaining." *Dean v. Trans World Airlines, Inc.*, 924 F. 2d 805, 809 (9th Cir. 1991). On the other hand, once these procedures are in place, the union may legally require all employees in the bargaining unit to pay either member dues or nonmember agency fees, and may legally enforce that requirement through procedures set forth in the collective bargaining agreement.

5. A nonmember of the union has the obligation of making his objection to the agency fee calculation known. *Hudson*, 475 U.S. at 306 n. 16. "Dissent is not presumed—it must affirmatively be made known to the union by the dissenting employee." *Id.*, *quoting Machinists v. Street*, 367 U.S. 740, 774 (1961).

6. Plaintiff did not at any time, by word or conduct, affirmatively make known to the union his election of nonmember status or invoke his right to pay nonmember agency fees rather than dues. Nor did he affirmatively make known any desire to dissent from the agency fee calculation. Instead, in January of 2000, he acquiesced in the payment of delinquent dues without in any way invoking his right to be a dissenting nonmember. While these facts did not, without more, make plaintiff a *de facto* member of the union, they reasonably led union officials to believe that plaintiff was a member rather than a nonmember.

7. Plaintiff received adequate notice from two different union officials at two different times of his rights under the Policies and Procedures Applicable to Nonmember Fee Payers, and of his obligation to affirmatively invoke those rights. He was correctly informed by Steve Lovas in the summer of 1999 that he must pay either union dues or agency fees. He was informed in January of 2000 by Kevin Jurasinski that January was the proper time to invoke these rights for the coming year, yet he failed to do so.

8. In July 2000, at the time that plaintiff was discharged for failure to pay either union dues or agency fees, there was a statement of germane and nongermane expenses available for members and nonmembers to review. The Court declines to find, as plaintiff urges, that this statement was constitutionally inadequate under *Hudson*, because plaintiff never affirmatively invoked his right to dissent or to challenge the statement until after his discharge.

9. In June 2000, when plaintiff was given notice of his delinquency and the requirement that he cure the delinquency or be discharged, he failed to respond within the required time. As plaintiff paid neither dues nor nonmember agency fees, the union had a right to enforce the agency shop agreement under the terms of the CBA. The fact that the letter from AMFA requested plaintiff's discharge on the basis of failure to pay dues, rather than failure to pay nonmember agency fees, does not alter this result. As shown above, it was reasonable for the union to believe that plaintiff was a member and treat him accordingly, even if in fact he was not.

10. Neither AMFA-National nor AMFA-Local 14 violated the RLA or the First, Fifth, or Fourteenth

Amendment by invoking Article 31 of the CBA and requesting plaintiff's discharge.

DECISION OF THE COURT

The Court finds in favor of defendants in this matter. The Clerk shall enter judgment accordingly.

DATED this 22 day of March, 2005.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

[Filed Aug 7, 2002]

CASE NUMBER: C01-003L

BERNARD J. MACKAY,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION, et al.

JUDGMENT IN A CIVIL CASE

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against plaintiff.

August 7, 2002

BRUCE RIFKIN
Clerk

/s/ Kerry Lane
By Kerry Lane, Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed August 6, 2002]

No. C01-0003L

BERNARD J. MACKAY,
Plaintiff,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION, *et al.*,
Defendants.

ORDER GRANTING ALASKA AIRLINES' MOTION FOR SUMMARY JUDGMENT

Defendant Alaska Airlines seeks summary judgment on all of plaintiff's claims for the same reasons, and on the same grounds, that the Court granted the union defendants' earlier motion for summary judgment. In response, plaintiff acknowledges that Alaska's "liability in this case is derivative of [the union's], so that if [the union] is not liable for violating his rights under the [Railway Labor Act] and the Constitution, neither is Alaska." Plaintiff's Opposition at 2. Nevertheless, plaintiff urges the Court to reconsider its Order of May 3, 2002, asserting that the Court overlooked important factors when it granted summary judgment in favor of the union defendants.

Plaintiff's request for reconsideration, which was not filed until May 20, 2002, is untimely and procedurally defective. Local Civil Rule 7(h)(2). The Court declines to reconsider the May 3rd Order and hereby GRANTS Alaska Airlines' motion for summary judgment for all of the reasons stated therein. The Clerk of Court is directed to enter judgment in the above-captioned matter against plaintiff and in favor of defendants.

DATED this 6th day of August, 2002.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed May 3, 2002]

BERNARD J. MACKAY,
Plaintiff,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION, *et al.*,
Defendants.

No. C01-0003L

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on "Plaintiff's Motion for Summary Judgment." For all of the reasons stated in this Court's Order Granting Union Defendant's Motion for Summary Judgment, of even date, the Court finds that plaintiff was a voluntary and consenting member of the Aircraft Mechanic's Fraternal Association and Local 14.[1] As a member of the union, plaintiff was not entitled to the procedural safeguards and detailed, audited financial disclosures mandated by *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U. S. 292 (1986), *Ellis*

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[1] This ruling is made only as part of the Court's jurisdictional analysis and does not bind or otherwise alter the scope of the System Board of Adjustment's review of the issues raised in plaintiffs Notice of Appeal.

v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, 466 U.S. 435 (1984), and *Dean v. TWA*, 924 F.2d 805, 809 (9th Cir. 1991). Thus, whatever defendant Alaska Airlines, Inc., did or failed to do to protect nonmembers from wrongful termination under the union shop provision cannot be the basis of liability to union members such as plaintiff.

Plaintiff's motion for summary judgment is, therefore, DENIED. Although it appears that the Court's decisions in the above-captioned matter have disposed of all of plaintiff's claims, defendant Alaska Airlines, Inc., has not moved for summary judgment. If, after reviewing these orders, Alaska Airlines believes that a dispositive motion would be appropriate, it may file such a motion no later than Thursday, May 16, 2002.

DATED this 3rd day of May 2002.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed May 3, 2002]

No. C01-0003L

BERNARD J. MACKAY,
Plaintiff,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION, *et al.*,
Defendants.

ORDER GRANTING UNION DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the "Motion of Union Defendants, AMFA and Local 14, for Summary Judgment." Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. Once the moving party has satisfied his burden, he is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Triton Energy*, 68 F.3d at 1221.

The facts of this case are, in large part, undisputed. From April 1985, when plaintiff was hired by Alaska Airlines as a mechanic, until April 1998, plaintiff and his bargaining unit were represented by the International Association of Machinists & Aerospace Workers ("IAM") through an "open shop" arrangement. Although the IAM represented plaintiff's unit for purposes of collective bargaining, the employees were not required to join the union or to pay dues or agency fees as a condition of their continued employment. Plaintiff chose not to join the IAM and did not pay any union dues or fees.

On or about April 1, 1998, the Aircraft Mechanics Fraternal Association ("AMFA") won a certification election administered by the National Mediation Board, thereby unseating the IAM as the representative of plaintiff and his fellow unit members. During the election campaign, plaintiff completed in a representation card on behalf of AMFA. Plaintiff argues that he never became a member of AMFA or its local, however, pointing to the fact that he did not complete an application for union membership, submit to an investigation, receive notice that he had been accepted into the union, take the oath of membership, or obtain a membership card as required by AMFA's Constitution. Nor was plaintiff's membership in Local 14 put to vote before the members at their monthly

meeting, as required by that entity's by-laws. Defendants, on the other hand, believed that plaintiff and all other employees in the bargaining unit became members of the union as soon as AMFA became their certified representative.

AMFA negotiated a new collective bargaining agreement ("CBA") which included a union shop clause requiring all employees to become union members and to timely pay all initiation and membership fees. Despite the language of the union shop clause, defendants acknowledge that they cannot legally condition an employee's continued employment on his or her becoming a member of the union. *See Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,* 475 U.S. 292 (1986). In order to protect an employee's First Amendment rights, he or she has the option of electing nonmembership status, under which AMFA would represent him or her in negotiations in exchange for the payment of an agency fee. Such nonmembers thereby avoid contributing to the union's political and ideological activities while still participating in the collective actions for which the union was certified.

In May 1999, plaintiff was given a ballot regarding the ratification of the new CBA. According to plaintiff's testimony and the documents produced by defendant, plaintiff filled in his name and address on the envelope, declined to vote on the substantive issue, and submitted the ballot as an absentee. Only union members were supposed to vote in this election, and the union was unaware of the fact that plaintiff's ballot, which was secret, had been left blank. The CBA was ratified in June 1999. Soon thereafter representatives of the union made plaintiff aware of the union shop clause and its implications.

Plaintiff was informed that he could become a nonmember agency fee payer and was provided a copy of AMFA's "Policies and Procedures Applicable to Non-Member Fee Payers." From June 1999 to his termination in July 2000, plaintiff had a number of conversations with union representatives regarding his obligation to pay dues and the nonmember option. The union consistently treated plaintiff as a member and he never disavowed that status. Although plaintiff knew that he could become a nonmember by telling the union that he wished to be an agency fee payer (MacKay Dep. Tr. 76:4-10), he did not do so. In fact, the first indication that plaintiff was asserting nonmember status or was otherwise asserting a First Amendment objection to union membership occurred after his termination.

Plaintiff failed to pay his union dues despite being informed by union representatives that such failure could result in his termination from employment at Alaska under the union shop clause of the CBA. On December 2, 1999, AMFA sent plaintiff a notice of delinquency and indicated that if he did not pay his September and October dues within fifteen days, his name would be submitted to Alaska for discharge. Plaintiff belatedly paid his dues for September and October, but by that time he was already in arrears for the months of November and December. Another notice was issued to plaintiff on May 17, 2000. When plaintiff failed to pay his membership dues, AMFA notified Alaska and requested, pursuant to the union shop clause, that plaintiff's employment be terminated.

Plaintiff was fired on July 11, 2000. The next day, plaintiff submitted a grievance asserting that he did not pay his dues because, when the union representa-

tive came to collect them, he was performing a time-sensitive job involving chemicals and relied on the representative's promise to return for the check. Plaintiff stated that he was willing to write a check that would bring him up-to-date. Plaintiff did not challenge AMFA's right to collect the dues at issue. The grievance was denied on July 24, 2000. Plaintiff appealed the denial to the System Board of Adjustment, asserting that Alaska Airlines lacked good cause for his termination, that the union should not have requested his discharge when the failure to pay was the fault of the union's representative, and that he had been deprived of his rights under *Hudson,* 475 U.S. 292. On August 31, 2000, Alaska acknowledged receipt of the notice of appeal and promised to schedule arbitration. On January 6, 2001, plaintiff unilaterally withdrew his appeal, stating that "[i]t is now clear to me that such a grievance process is futile in my situation, given AMFA's lack of support (and actual opposition), and the fact that further hearings have not been expeditiously scheduled." This litigation was filed three days before plaintiff withdrew from the arbitration process.

AMFA and Local 14 argue that plaintiff's claims should be dismissed because (1) he failed to exhaust the administrative machinery he initiated when he appealed his termination to the Systems Board of Adjustment; (2) this is a minor dispute involving the correct interpretation of the union shop clause and is subject to mandatory arbitration under the Railway Labor Act; and (3) plaintiff was contractually bound to pay union dues and cannot claim any viable exception. All of defendants' arguments assume that plaintiff was a member of the union. If that were the case, plaintiff apparently concedes that he would have had

a contractual obligation to pay membership dues and complete the appeal process established by the CBA.

All of plaintiff's arguments start from the opposite assumption that plaintiff was not a member of the union and was, therefore, entitled to the protections of *Hudson*. In such circumstances, the union defendants would have had no right to collect any fees from plaintiff until the requirements of *Hudson* were satisfied, raising the possibility that his termination for failure to pay dues was improper. *See Dean v. TWA*, 924 F.2d 805, 809 (9th Cir. 1991). The question then would be whether plaintiff's objection to the termination was subject to an arbitration agreement that satisfies *Air Line Pilots Assoc. v. Miller*, 523 U.S. 866 (1998).

In order to determine whether the System Board of Adjustment has exclusive jurisdiction over the issues raised in this litigation, the Court must first determine whether MacKay was a member of AMFA. As defendants point out, this exercise is fraught with procedural difficulties. If, after reviewing the evidence, the Court ultimately determines that plaintiff was not a member of AMFA, he would have a First Amendment/*Hudson* claim that need not be exhausted and could properly be heard in federal court. If, on the other hand, the evidence shows that plaintiff was a member of AMFA at the time of his termination, his initiation of the administrative procedures established by the CBA would place these issues squarely within the jurisdiction of the System Board of Adjustment. In such circumstances, this Court would have had no authority to consider any of the claims contained in plaintiff's Notice of Appeal, including the threshold issue of union membership. In recognition of these difficulties, the Court has at-

tempted to resolve this dispute without interfering with whatever authority the Board still has to rule on the claims raised in plaintiff's Notice of Appeal.

Having reviewed the pleadings, declarations, and exhibits submitted by the parties, and having considered the arguments of counsel at the April 22, 2002, hearing, the Court finds as follows:

1. The evidence submitted by the parties regarding plaintiff's conduct between June 1999 and July 2000 would lead a reasonable factfinder to only one conclusion: plaintiff was a member of AMFA and Local 14. Although the procedural formalities of union membership were universally ignored following AMFA's certification as the representative of plaintiff's bargaining unit, there do not seem to be any absolute prerequisites to becoming a member of a union. When pressed at oral argument, plaintiff's counsel agreed that, in certain circumstances, membership can be established through conduct. In this case, it is undisputed that plaintiff made no effort to reject the membership that the union unilaterally conferred upon him, he completed an AMFA representation card during the union campaign, he accepted a ballot and voted in a union election, he never asserted any constitutional objection to the union's use of members' funds, and, despite knowing that there was a mechanism for becoming a nonmember, he never spoke to anyone about pursuing that option. Plaintiff was aware, through numerous conversations with union representatives, that the union believed him to be a member and yet, despite ample opportunities, took no steps to assert the nonmember status he now claims. Even more telling is the fact that when he was threatened with discharge for failing to comply with his membership obligations, plaintiff did not chal-

lenge the underlying assumption that he was, in fact, a member.

The evidence shows that, at all times relevant to plaintiff's claim, he was a voluntary and consenting member of the union. That plaintiff's litigation strategy now compels a different approach cannot change the nature of plaintiff's conduct between June 1999 and July 2000 or otherwise forestall the conclusion that plaintiff was a member of AMFA and Local 14.

2. As a member of the union, plaintiff was not entitled to the procedural safeguards and detailed, audited financial disclosures mandated by *Hudson, Ellis v. Brotherhood of Railway., Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435 (1984), and *Dean*.

3. Union members such as plaintiff may, through a collective bargaining unit, waive whatever rights they otherwise would have had to a judicial forum and remedy. *Klemens v. Air Line Pilots Ass'n*, 736 F.2d 491, 497 (9th Cir.), *cert. denied*, 469 U.S. 1019 (1984). Employees who have a dispute with a union generally must attempt to exhaust the exclusive grievance and arbitration procedures provided by the CBA. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1001 (9th Cir. 1970). By appealing his termination to the System Board of Adjustment, the Board acquired exclusive jurisdiction over this dispute. *Stumo v. United Air Lines, Inc.*, 382 F.2d 780, 788 (7th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968). Plaintiff's attempt to exhaust the grievance and arbitration procedures established by the CBA came to an abrupt halt when he unilaterally withdrew his claims: such truncated efforts are insufficient and do not satisfy the exhaustion requirement.

Plaintiff argues, however, that his failure to exhaust should be excused. The facts surrounding plaintiff's appeal do not provide a basis for depriving the System Board of Adjustment of jurisdiction or otherwise allowing plaintiff to avoid arbitration in favor of federal litigation. The fact that the Board was made up of union and company representatives and that another employee may have been unfairly treated and/or obtained an adverse decision does not lead to the conclusion that plaintiff's attempt to exhaust the administrative process would have been futile. Courts have generally required some showing that the employee's repeated complaints have fallen on deaf ears or been affirmatively rejected. In this case, plaintiff filed a grievance, appealed its denial (raising, for the very first time, the *Hudson* issue) and, without communicating with the Board or otherwise giving it an opportunity to respond, withdrew the appeal on grounds of delay and futility. Two of the three circumstances which supported a finding of futility in *Dean* (*i.e.*, that the employee's earlier complaints had been ignored and that the defendants had repudiated the grievance procedures) are not at issue here. If plaintiff's interpretation of *Dean* were correct, the fact that administrative decision-makers are chosen by the union and/or company would automatically invalidate the contractual grievance and arbitration procedures whenever the union declined to pursue a grievance. This is clearly not the law and the Court declines to extend the holding of *Dean* in the circumstances presented here.

4. The union argues that this Court does not have jurisdiction over plaintiff's claims under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*

Congress enacted the RLA to promote stability in labor-management relations by providing a framework for resolving labor disputes in the railroad industry. *See Atchison, Topeka & Santa Fe Railway Co. v. Buell,* 480 U.S. 557, 562 (1987). Title II of the RLA extends the RLA's coverage to the airline industry. 45 U.S.C. § 181. Congress specifically intended the RLA to keep airline labor disputes out of the courts. *See Lewy [v. Southern Pac. Transp. Co.,* 799 F.2d 1281, 1289 (9th Cir. 1986)]. Consequently, the RLA provides for mandatory administrative grievance procedures as the exclusive remedy in claims arising from "minor disputes" "under collective-bargaining agreements. *See Andrews v. Louisville & N.R. Co.,* 406 U.S. 320, 322-23 (1972). "Minor disputes" are the "grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 94 (1978). We have also defined "minor disputes" as those which are "arguably" governed by the CBA or have a "not obviously insubstantial" relationship to the labor contract, *Magnuson [v. Burlington Northern, Inc.,* 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978)], "are 'inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA,'" *Edelman v. Western Airlines, Inc.,* 892 F.2d 839, 843 (9th Cir.1989) (quoting *Magnuson*, 576 F.2d at 1369), or which involve the interpretation of a current collective-bargaining agreement. *See International Association of Machinists & Aerospace Workers v. Republic Airlines,* 761 F.2d 1386, 1390 (9th Cir. 1985);

Schroeder v. Trans World Airlines, Inc., 702 F.2d 189, 191 (9th Cir. 1983).

Melanson v. United Air Lines, Inc., 931 F.2d 558, 561-62 (9th Cir.), *cert. denied*, 502 U.S. 865 (1991). Although it would appear that plaintiff's claims constitute a minor dispute under the RLA, whether grievances between an employee and the union trigger the exclusive jurisdiction of the System Board of Adjustment and are preempted under the Act has not been adequately briefed by the parties. *See Klemens*, 736 F.2d at 497. Because plaintiff's voluntary invocation of the arbitration proceeding deprives this Court of jurisdiction, the RLA issues need not be decided.

For all of the foregoing reasons, AMFA and Local 14's motion for summary judgment is GRANTED. This Court does not have jurisdiction over a dispute which plaintiff voluntarily placed before the System Board of Adjustment. Although the Court had to consider plaintiff's relationship with the union before it could determine the jurisdictional issue presented by defendants, the Court's analysis is preliminary and/or extrajurisdictional. If the appeal is ever presented to the Board, the arbitration should consider all of the issues raised in plaintiff's Notice of Appeal *de novo*.

DATED this 3rd day of May 2002.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX J

[LOGO] AIRCRAFT MECHANICS
FRATERNAL ASSOCIATION
Administration office: 67 Water Street, Suite 208A •
Laconia, NH 03246
Tel: 603 527-9212 • Fax: 603 527-9151

December 2, 1999

BERNARD MACKAY

Re: Delinquent Dues

Dear Bernard:

Our records indicate that we have not received your October dues in the amount of $44. This amount represents two times your base rate of $22. Additionally, we show that you owe dues for September in the amount of $44. Therefore, your *total* due outstanding at this time is $88.

If you think our records are in error and you did pay dues for the periods in question, please send a copy of your pay stub showing dues being deducted or a copy of your cancelled check. If you have not yet paid your outstanding dues please do so before December 17, 1999. Make your check payable to AMFA and send it to AMFA administration, PO Box 1221, Laconia, NH, 03247-1221.

Article 31 of the agreement states that we notify you of your delinquency and provide you with fifteen (15) days to either remit the total amount due or contact us with proof that you either paid this amount or do not owe the amount stated above. Therefore, if we do not hear from you by December 17, 1999, we must submit your name to the Company for action under Article 31.D of the Agreement.

Thank you for your cooperation and do not hesitate to contact us with any questions you may have.

Sincerely,

/s/ Steve Kadziulis
Steve Kadziulis
National Treasurer

SK:mad

cc: National Administration
Local

No. 08-939

In The

Supreme Court of The United States

BERNARD MACKAY,

Petitioner,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION and AIRCRAFT MECHANICS FRATERNAL ASSOCIATION LOCAL 14,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

As the Ninth Circuit stated, "[t]his *Hudson*[1] case turns on whether Bernard J. Mackay was a member of the Union." (App. 2a). According to the Ninth Circuit, the finding that Mackay was a member is a "finding of fact." (App. 8a).

The trial court found that Mackay was a voluntary and consenting member of the Union when he was terminated for non-payment of Union dues, and the Ninth Circuit affirmed. Mackay now seeks review of the factual finding that Mackay knowingly and voluntarily accepted the Union's offer of membership.

The question presented is:

Should this Court grant review to consider whether the Ninth Circuit erred in affirming the trial court's factual finding that Bernard Mackay was a voluntary and consenting member of the Union based on his acceptance of the Union's offer of membership?

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[1] *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

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STATEMENT OF THE CASE

A. Introduction

After Petitioner's termination for non-payment of Union dues, he brought this action claiming the protections provided by *Hudson*. However, at every stage of this lengthy litigation, Petitioner has been found to have been a voluntary and consenting member of the Union based on actions that he took, and did not take, in his relationship with the Union. "As a member of the union, plaintiff was not entitled to the procedural safeguards and detailed, audited financial disclosures mandated by *Hudson*, *Ellis*...and *Dean*." (App. 40a).

Petitioner seeks review on the grounds that the Ninth Circuit's decision implicates important legal principles concerning the right of employees voluntarily to choose or reject union membership. However, that is not the issue here. This case does not undermine or affect an employee's right to choose or reject union membership, and neither the Ninth Circuit nor the Respondents dispute that such a right exists.

At issue here is whether the evidence supports the factual finding that "Mackay thereby accepted the Union's offer of membership." (App. 3a). Respondents submit that there is no basis for this Court to review this finding of fact.

B. Statement of Facts[1]

On April 1, 1998, the Aircraft Mechanics Fraternal Association ("AMFA") was certified by the National Mediation Board ("NMB") as the exclusive representative of the craft or class of Mechanics and Related Employees of Alaska Airlines ("Alaska"), replacing the International Association of Machinists ("IAM"). Upon its certification, AMFA inherited the existing Alaska-IAM collective bargaining agreement, which did not contain a union security clause requiring the payment of union dues or agency fees as a condition of employment.

Following the NMB's certification of AMFA, AMFA's highest governing body, its National Executive Council ("NEC"), made, and then implemented, a decision, confined to Alaska mechanics, to waive the formal or constitutional prerequisites for becoming a union member. (SER 179, line 3; 181, line 12; 182, line 5).

The waiver was not unique to any one individual or group, but rather the waiver was universal to all mechanics in the Alaska bargaining unit represented by AMFA. (SER 181, lines 11-12). In

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[1] In this brief, references to the record in the Ninth Circuit are as follows: "ER" refers to Petitioner-Appellant's Excerpts of Record; "SER" refers to Respondents-Appellees' Supplemental Excerpts of Record; "Dkt" refers to docket entries in the District Court; and "Tr. Ex." refers to trial exhibits.

this manner, no mechanic was burdened with the constitutional formalities of filling out an application, being investigated, taking an oath, or obtaining a vote of approval, nor was any mechanic burdened with the added financial requirement of paying an initiation fee. (SER 36, line 7; 185, lines 9-24).

Initially under the waiver (i.e., before a union security clause was negotiated into a new contract), no requirements for membership were imposed at all, and even paying dues was strictly voluntary. (SER 181, line 19). Later, if and when a union security provision was obtained in a new contract, then payment would suffice for membership: "there were informational notices put out that you could become a member by signing a dues check-off or paying the union directly." (SER 94, line 23).

The purpose of the waiver was to make the union democratic processes, such as ratification elections for the upcoming new contract, or election for officers, as accessible as possible to all mechanics in the bargaining unit, regardless of whether those mechanics had supported or opposed AMFA in the campaign to replace the prior union. (Tr. Ex. 8; ER 374). This was important at the time because, unlike Mackay, who had evidenced some support for AMFA,[2]

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[2] Mackay, too, participated in the campaign to get AMFA on the property by completing a representation card and handing it to Kevin Jurasinski (SER 110, line 21), who was then a fellow mechanic and who later became President of Local 14 and who later still credibly testified (ER 3, line 6) at the trial about his many exchanges with Mackay.

some mechanics had not and consequently were on the "losing" side, yet AMFA now faced the need to rally the bargaining unit for upcoming contract negotiations and an eventual contract ratification election.[3]

Consistent with this waiver, on April 8, 1998, AMFA's National Director, O.V. Delle-Femine, published a memorandum addressed to all Alaska-employed mechanics that stated, *inter alia*: "In AMFA everyone is a member in good standing and they can vote on the contract, the by-laws and local officers." (ER 375). Delle-Femine's memorandum was posted on the union bulletin board at work sites accessible to all Alaska mechanics at the time. (SER 9, lines 14-22; 114, lines 1- 15).

Soon after becoming the bargaining agent for the mechanics at Alaska, AMFA entered into contract negotiations with the company, and eventually a tentative agreement was negotiated. (ER 66, admission 11). Following this, in June of 1999, a ratification election over whether to accept the tentative agreement was held, and as a result, the contract was ratified.[4] (SER 108, line 24).

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[3] There is no evidence in the record to support Petitioner's allegation that the purpose of the waiver was "to collect dues as quickly as possible." (Petition at 7).

[4] With Mackay's help, too, when he obtained an absentee ballot. (ER 118, line 9); (Trial Ex. 10).

The new Alaska-AMFA contract included a "union security clause" found in Article 31. (ER 67, admission 12; Tr. Ex. 6; ER 369). By virtue of the new contract, the mechanics' bargaining unit at Alaska became an "agency shop," meaning that as a condition of maintaining employment at Alaska, all mechanics were required to pay to the union either membership dues or, in the alternative, agency fees in the case of non-members.[5] (ER 369: "Article 31: Union Shop"). Pursuant to Article 31, the Union was required to notify an employee who was delinquent in the payment of dues or fees before the employee could be discharged. (ER 369, line 26).

Under the earlier waiver of the Union's constitutional prerequisites for membership, no mechanic was forcibly enrolled as a member in the union (SER 86, line 7; 133, line 7; 183, line 21); rather, the waiver was extended as an *offer* of membership that could be accepted by payment of dues: "Waiving of the membership requirement was an *offer* to be a member." (SER 182, line 5). The only step required to accept membership was payment of dues. (SER 185, line 25). Thus, AMFA provided a fundamental choice of either membership by dues payment, or non-membership by payment of agency fee. (SER 183, line 18).

Mackay was personally notified of his choice to be either a member or a non-member. In 1999, Steve

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[5] Such provisions are lawful under the Railway Labor Act, 45 U.S.C. § 152, Eleventh

Lovas, a Union officer who worked alongside Mackay, personally brought Mackay a copy of the proposed new AMFA-Alaska contract, and advised him that it included a proposed union security clause. (SER 96, line 6).

After the tentative agreement was ratified in an election, Lovas personally brought Mackay a copy of AMFA's "Policies and Procedures Applicable to Nonmember Fee Payers" (the "Nonmember Policy") and personally discussed it with him. (SER 97, line 22). Under the Nonmember Policy, a mechanic could assert his right to be a non-member of the Union, and consequently qualify to pay agency fees instead of membership dues in order to maintain his employment. (Tr. Ex. 12; ER 381; Tr. Ex. 13; ER 384; SER 119, line 19). Lovas specifically called to Mackay's attention that there was now a union security clause in the contract so as to make sure that Mackay knew that he could choose to be a union member with the obligation to pay dues, or that he could choose not to be a member, but then with an obligation to pay an agency fee. (SER 99, line 3).

Lovas specifically advised Mackay that if he did not want to be a member and/or objected to paying membership dues, then he had to notify the Union of that fact. (ER 183, line 12).

Mackay, however, never told Lovas, or otherwise notified him, that he objected to membership. (SER 23, line 3).

A copy of the AMFA-Alaska contract, which included the union security provision in Article 31, was

given to Mackay in August of 1999, and he signed a receipt for it. (Tr. Ex. 87; SER 7, line 11). AMFA Local 14 President Kevin Jurasinski personally informed and advised Mackay of the meaning of Article 31, as well as the consequences of violating it. (SER 5, line 14).

In October 1999, when Jurasinski learned that Mackay was not paying either union dues or non-member agency fees, Jurasinski met with Mackay and specifically warned him that his job was in jeopardy, because he was in arrears in the payment of either union membership dues or non-member fees. (SER 116, line 15). Mackay responded that "he didn't have a problem paying dues" (SER 116, line 20), and did *not* assert himself to be a non-member. (SER 117, line 10-13). Jurasinski advised Mackay that he was not required to be a union member but instead told him that he had the choice of being a non-member. (SER 116, line 17).

Mackay, however, paid neither dues nor fees at any time in 1999 (SER 120, line 2) notwithstanding the warning he had received from Jurasinski in October 1999. (SER 120, line 7).

As a result, on December 2, 1999, AMFA mailed to Mackay a certified letter informing him that he was delinquent in the payment of union membership dues, and that pursuant to the contract's union security provision, his name would be submitted to Alaska for termination if he did not make payment within fifteen days. (App. 44a-45a). Nevertheless, Mackay did not make any payment, whether of dues or of fees, by the

deadline. (ER 125, line 5; SER 121, line 1-15).

On January 6, 2000, Jurasinski sought out Mackay at work to tell him that, because Mackay remained in arrears, the Union would have to submit his name to the company for termination. (SER 121-122). Mackay at that time handed Jurasinski a check made out to "AMFA" in the amount of $90, and, on the check Mackay wrote, in the "For" line, "Nov./Dec." (ER 219, line 9; Tr. Ex. 19; ER 390; SER 122, line 21). Jurasinski understood that the check was payment of membership dues. (ER 219, line 20; SER 117, line 2).

After receiving dues payment from Mackay on January 6, 2000, Jurasinski considered Mackay a union member. (SER 123, line 22). But Mackay again went into arrears. (SER 123, line 25). Between the dues payment he made on January 6, 2000, and his termination on July 11, 2000, Mackay never made payment of any kind again. (SER 124, line 7).

In this same period, Mackay did not give any notice to the Union of objection to paying union membership dues or in any way attempt to establish dues objector status. (SER 58, line 5).

On May 17, 2000, AMFA sent yet another notice of delinquency to Mackay, which warned that if he did not pay by June 1, 2000, the Union would submit his name to Alaska for termination. (SER 124, line 21; SER 194; Tr. Ex. 21). After receiving the May 17 notice, Mackay raised no objection to paying dues, or asserted any claim to pay non-member fees. (SER 35, line 15; 63, lines 8-19).

On June 16, 2000, the Union notified Alaska that Mackay had failed to pay union membership dues and should be discharged pursuant to the union security provision. (Tr. Ex. 24; ER 401); (SER 191, line 3). Mackay was terminated on July 11, 2000. (Tr. Ex. 27; ER 403).

Following his discharge, Mackay exercised his right under the contract to file a grievance to contest his discharge. (ER 134, line 6); (Tr. Ex. 89; SER 196). Mackay's grievance made no claim that he was a non-member entitled to the protections of *Hudson*. Similarly, at a grievance hearing, Mackay made no claim he was not a member when discharged, or that he objected to paying dues, or that he wanted to pay fees instead of dues. (SER 150, lines 10-14; 151, line 23).

After Alaska denied Mackay's grievance, he filed an appeal to the System Board of Adjustment demanding an arbitration hearing. (ER 137, line 18); (SER 74, line 21; 154, line 17). The Appeal's recitation of facts expressly asserted that Mackay was willing to pay "delinquent ... dues," contained no objection to paying dues, and did not assert that Mackay was not a member of the union. (SER 199, ¶ 2).

However, before Mackay's grievance was heard in an arbitration hearing, or even scheduled, on January 6, 2001, Mackay unilaterally withdrew his grievance.

Mackay first unequivocally claimed that he was not a member of the union at the time he was

discharged, when he filed his lawsuit in early January 2001. (ER 38, line 22); (SER 69, lines 5-10). The District Court found that Mackay's late claim to non-membership was a "litigation strategy" that could not "change the nature of plaintiff's conduct between June 1999 and July 2000 or otherwise forestall the conclusion that plaintiff was a member of AMFA and Local 14." (App. 40a).

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Decision is Not Inconsistent with the Precedents of this Court or Other Circuit Courts.

Contrary to the Petitioner's argument, the decision of the Ninth Circuit does not conflict with relevant decisions of this Court or other United States courts of appeals. The Ninth Circuit affirmed the district court's factual finding that Mackay was a voluntary and consenting member of the Union.[6]

Petitioner points out that as a matter of law, membership in a union is voluntary and therefore no employee can be compelled to be a member. (Petition at 10-11). But that principle is not an issue in this case because AMFA has never claimed otherwise and the Ninth Circuit did not so hold, nor can Petitioner point to any communication from AMFA prior to his

[6] Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings..."

discharge, or during his grievance, that asserts a right to compel Petitioner's membership. Thus, the point is purely rhetorical and provides no basis for review. Rather, this case is about accountability for a choice made.

Yet Petitioner goes on to claim that "an employee's 'default position' is nonmembership in the union unless and until he affirmatively chooses to change that status." (Petition at 13). According to Petitioner, a contrary result would leave every type of association "free to conscript anyone it chooses into membership." (Petition at 13). However, such a conscription risk is not implicated in this case.

This case required the District Court and the Ninth Circuit to look at whether the actions and the inactions that they found Petitioner affirmatively undertook - and which are not disputed - constituted voluntary membership under the facts. There is no quarrel with the point that free association means that individuals may freely associate or not, nor did the Ninth Circuit hold otherwise. What the Ninth Circuit *did* hold was that the following affirmative actions and inactions, intentionally and knowingly taken or not taken, are those that directly support the conclusion that Petitioner voluntarily became a union member prior to his discharge:

> Mackay was twice told that he could be either a Union member who paid dues, or a nonmember who paid agency fees. He was told that under the union security clause in the collective bargaining agreement, he could lose

> his job if he did not pay one or the other. Mackay was also twice given the Nonmember Fee Policy, which explained, among other things, the difference between Union expenses germane to collective bargaining – which all employees cover – and non-germane expenses – which only members are obliged to cover. The Policy also indicated that employees were required to pay either dues or fees to keep their job. Mackay did not pay anything until January 2000, when he wrote a check for past dues owed after being warned that his name would be submitted for termination. At no time did he tell Union officials that he did not want to pay dues or be a member.[7]

(App. 2a-3a). Based on the above facts, the Ninth Circuit found that the district court "could conclude that Mackay thereby accepted the Union's offer of membership." (App. 3a).

The cases cited by the Petitioner are distinguishable and, therefore, not in conflict with the Ninth Circuit's decision in this case. *United Nuclear Corp. v. NLRB*, 340 F.2d 133 (1st Cir. 1965) is

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[7] Petitioner points to trial testimony in which Mackay testified that he told Local 14 President Jurasinski that he would not join. (Petition at 9). However, the trial court found that in October 1999 when Mr. Jurasinski told Mackay that he had to either pay union dues or a nonmember agency fee, Mackay "did not state that he did not want to be a union member." (App. 13a). The trial court found that "Mr. Jurasinski was a highly credible witness." *Id.* In any event, at most Petitioner alleges a factual error not appropriate for review in this Court.

distinguishable because in that case, unlike here, there was no waiver of the constitutional requirements for becoming a union member, which, in AMFA's case, applied to all mechanics in the Alaska bargaining unit. (SER 181, lines 11-12). Further, there was no evidence in *United Nuclear* that the employees were advised of their choice to be either members or nonmembers, as the Ninth Circuit found in Mackay's case. For the same reason, *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992), is distinguishable. In that case, the SUNY Albany students did not have a choice whether or not to become members of NYPIRG – the court found that their membership had been compelled. That was not so with respect to Mackay. According to the Ninth Circuit, "Mackay was twice told that he could be either a Union member who paid dues, or a nonmember who paid agency fees." (App. 2a). Petitioner's cases on compelled membership do not conflict with the ruling in this case.

Petitioner concedes that "this Court's labor law jurisprudence is based on the principle that union membership is a voluntary contractual arrangement requiring an agreement to be bound and mutuality of promises." (Petition at 12). *NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973) ("The relationship between a member and his union is generally viewed as contractual in nature, and the local law of contracts or voluntary associations usually governs the enforcement of this relationship") (citations omitted).

In this case, the Ninth Circuit applied the local law of contracts to the relationship between AMFA

and Mackay. (App. 3a). *Hoglund v. Meeks*, 170 P.3d 37, 46 (Wash. Ct. App. 2007) ("A contract may be oral as well as written, and a contract may be 'implied in fact with its existence depending on some act or conduct of the party sought to be charged'") (citation omitted); *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005) (under the objective manifestation theory of contracts, which Washington follows, the court attempts "to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties") (citation omitted); *Plumbing Shop, Inc. v. Pitts*, 408 P.2d 382, 384 (Wash. 1965) (Washington courts "impute to a person an intention corresponding to the reasonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between two parties") (citation omitted).

Here, the record shows beyond dispute that Mackay objectively manifested both payment of dues, albeit a single time, and a repeated willingness to pay dues and that he did so without qualification · and that payment of dues was the manner of acceptance the Union sought for its offer of membership throughout the mechanics' bargaining unit at Alaska. That Mackay indicated an unwillingness to participate in union activities or to get mail (Petition at 8) is not the same as not agreeing to join because participation or getting mail were never membership requirements, nor was that ever claimed.

The Ninth Circuit held that Mackay accepted AMFA's offer of membership. (App. 3a). It did not hold that Mackay was "conscripted" into union membership without his knowledge or consent. Accordingly, this decision is not in conflict with the decisions of this Court or other Circuits that recognize the principle of voluntary unionism.

B. The Ninth Circuit's Decision Does Not Undermine the Principle of Voluntary Unionism or the Ruling in *Hudson*.

Petitioner's argument that the Ninth Circuit's decision "undermines the fundamental federal labor principles of 'voluntary unionism,'" as reflected in *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), is without merit.

In *Pattern Makers*, this Court decided the issue of "whether a union is precluded from fining employees who have attempted to resign when resignations are prohibited by the union's constitution." *Id.* at 101. The constitution at issue provided that resignations were not permitted during a strike or when a strike is imminent. *Id.* at 96-97. This provision was held invalid because union restrictions on the right to resign are "inconsistent with the policy of voluntary unionism implicit in [NLRA] § 8(a)(3)." *Id.* at 104.

This case, however, does not involve any restrictions on the right to resign. To the contrary, the Ninth Circuit found that "Mackay was twice told that he could be either a Union member who paid dues, or a

nonmember who paid agency fees." (App. 2a). Unlike the union members in *Pattern Makers*, who were constitutionally barred from resigning, Mackay was clearly informed of his right to be a non-member.

Nor does the Ninth Circuit's decision undermine, or in any way conflict with, this Court's ruling in *Hudson*, as argued by the Petitioner. (Petition at 18). *Hudson* plainly concerns only nonmember rights and the constitutional requirements for a union's collection of agency fees (not membership dues), despite the Petitioner's attempt to argue that this Court has not limited *Hudson*'s protections only to nonmembers. *Id.* As stated by this Court, *Hudson* concerned "the constitutionality of the procedure adopted by the Chicago Teachers Union ... to respond to nonmembers' objections...." *Hudson*, 475 U.S. at 294. Thus, upon finding Mackay a member, no *Hudson* issue existed for the Ninth Circuit.

CONCLUSION

In this case, the Petitioner was offered the choice of being a member or a nonmember, and, by his conduct, he accepted the Union's offer to be a voluntary and consenting member. Because this factual finding does not undermine the policy of voluntary unionism, or conflict with the decisions of this Court or other Circuit courts, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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